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In the Supreme Court of the United States

OCTOBER TERM, 1982

RONALD EDWARD SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a warrantless search of an airplane violated the Fourth Amendment.

2. Whether the district court correctly admitted certain evidence obtained from a source independent of the illegal arrest and search of petitioner.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Berenyi v. *Immigration Director*, 385 U.S. 630 8

Cardwell v. *Lewis*, 417 U.S. 583 6

Chambers v. *Maroney*, 399 U.S. 42 ..... 5, 6

Colorado v. *Bannister*, 449 U.S. 1 5

Coolidge v. *New Hampshire*, 403 U.S. 443 .... 5, 6

Fitzpatrick v. *New York*, 414 U.S. 1050 8

Texas v. *White*, 423 U.S. 67 5

United States v. *Chadwick*, 433 U.S. 1 6

United States v. *Fogelman*, 586 F.2d 337 6

United States v. *Kelly*, 547 F.2d 82 6

United States v. *Martin*, No. 81-5132 (4th Cir. Oct. 6, 1982) 6

United States v. *Payne*, 429 F.2d 169 6

United States v. *Reliable Transfer Co.*, 421 U.S. 397 8

United States v. *Ross*, No. 80-2209 (June 1, 1982) 6

Page

Constitution and statutes:

United States Constitution, Fourth Amendment 7
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
21 U.S.C. 952(a) 2
21 U.S.C. 960(a)(1) 2
21 U.S.C. 963 2

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A47) is reported at 670 F.2d 185.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1982. A petition for rehearing was denied on March 25, 1982. On May 18, 1982, Justice Powell extended the time for filing a petition for a writ of certiorari to and including June 9, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Alabama, petitioner and three co-defendants, Julius Olson, William David, and Dan Fowler, were convicted of conspiracy to import marijuana,

in violation of 21 U.S.C. 963 (Count 1), importation of marijuana, in violation of 21 U.S.C. 952(a) and 960(a)(1) (Count 2), conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (Count 3), and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 4). Petitioner was sentenced to five years' imprisonment on each count, with the terms of imprisonment on Counts 2 and 4 to be followed by special parole terms of two years. The sentences on Counts 2 through 4 were to run concurrently with one another, but consecutive to that imposed on Count 1.

The facts, which are not in dispute, are summarized in the opinion of the court of appeals (Pet. App. A2-A8). On October 15, 1980, Brenda Huey observed a twin-engine airplane land on the airstrip at the Huey farm near Opelika, Alabama (Tr. 51).[1] Mrs. Huey went to investigate, and, as she peered around a hangar, she saw two men hurriedly unloading boxes from the airplane into a pickup truck. She heard one of the men say: "Hurry up! Hurry up! We have to get out of here" (Tr. 52-54). Because this conduct aroused her suspicions, Mrs. Huey telephoned her husband's office and talked with his business partner, Flim Wilson, about what she had just seen (Tr. 55). Wilson called the police and then drove out to the Huey farm (Tr. 120-121).

On his way to the Huey residence, Wilson noticed a person, whom he later identified as co-defendant Olson, sitting alone in an Oldsmobile on the side of the road next to Bishop's Grocery, less than a mile from the Huey farm. Wilson wrote down the license plate number of the car and continued toward the farm (Tr. 121-124). Before reaching the farm, Wilson met Sam Wiley, an employee of his, driving a red pickup truck. Two other men were riding with

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[1] "Tr." refers to the trial transcript; "H. Tr." refers to the transcript of the suppression hearing.

Wiley in the truck. Wilson asked Wiley if he had been at the airstrip, and, when Wiley said yes, Wilson told him he had called the police and would call back to tell them it was a false alarm (Tr. 145). Wilson then went on to the farm, where he telephoned the police and told them to disregard his previous call (Tr. 126, 145-146). A few minutes after Wilson arrived at the farm, Wiley drove up. This time, however, he was accompanied by Olson—whom Wilson had just seen in the Oldsmobile before first encountering Wiley (Tr. 126-127). Wiley and Olson left again and went in the direction of the airstrip (Tr. 127).

Mrs. Huey had called the police herself, however, and Officer Sumners of the Opelika Police Department arrived at the farm. He spoke with Mrs. Huey and Wilson and then went to the airstrip (Tr. 80, 187-189). There he found Wiley and Olson standing at the door of the airplane; three airplane seats were on the ground outside the plane (Tr. 189-190). Wiley explained to Wilson that he had just picked Olson up at the Mariner Inn, but Wilson informed the police that this statement was almost surely false because Wiley had not had time to travel that distance (see Pet. App. A5). Other police officers were called and arrived shortly thereafter. One officer noticed some marijuana residue on the top step of the airplane. He entered the plane and found more marijuana residue inside the aircraft (Tr. 234, 303-304). Apart from the marijuana, other items found inside the airplane linked petitioner to the aircraft and were introduced as evidence at trial (Tr. 305, 397). The keys to the airplane were found partially covered with dirt near Olson's feet (Tr. 267-268, 306).

The airplane was flown from the Huey residence to the Auburn-Opelika airport later that afternoon by a charter pilot, who was approached by two men asking to be flown to Monroe, Georgia (Tr. 498-511). The police questioned

the two men, later identified as petitioner and Larry David, and arrested them. Car keys seized from petitioner were found to fit an Oldsmobile parked outside the airport—the same Oldsmobile that Wilson had earlier seen and whose description and license number he had given to police (H. Tr. 134-146, 150; Tr. 779). The Oldsmobile was seized by the police and later searched pursuant to a search warrant.

Prior to trial, the district court denied the defendants' motions to suppress evidence from the airplane and the car, but suppressed all evidence seized from the persons of David and petitioner on the ground that there was no probable cause to support their arrest (see Pet. App. A6-A7). The court of appeals affirmed (*id.* at A1-A47). The court held that the officers had probable cause to search the airplane and that exigent circumstances justified a warrantless search (*id.* at A9-A13). The court also rejected petitioner's contention that the search of the car was a fruit of petitioner's illegal arrest, explaining that the search of the car derived from an independent source (*id.* at A14-A17) and, moreover, that other leads that the police were pursuing would inevitably have led to the search of the car (*id.* at A17).

ARGUMENT

1. Petitioner contends (Pet. 17-38) that the court of appeals erred in upholding the warrantless search of the aircraft. He apparently concedes that probable cause for the search did exist (Pet. 22),[2] but argues that because the

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[2]The court of appeals relied on several facts in concluding that there was probable cause: Mrs. Huey had seen two men unloading boxes from the plane, obviously in a hurry; Wiley was seen driving away from the farm with two strangers and returning with a third, who had been seen parked nearby; Wiley told Wilson an implausible story about where he had picked up Olson; when Officer Sumners arrived at the airstrip Olson first began walking away towards the woods before returning to speak with the policeman (see Pet. App. A10-A11).

airplane was surrounded by a number of police officers who had Olson and Wiley in custody, the government failed to show that exigent circumstances made it impracticable to obtain a warrant. This argument is without merit.

a. First, the court of appeals correctly found that there were exigent circumstances here that justified an immediate search (see Pet. App. A10-A12). The plane had landed recently and obviously was highly mobile. Petitioner notes that two co-defendants were in custody at the time of the search and thus did not reasonably have access to the airplane. But, as the court of appeals noted (*id.* at A11-A12), the two suspects who had been seen loading the boxes onto the pickup truck had fled and had not even been identified. Thus, there remained a danger that evidence in the airplane could have been removed or destroyed or the plane itself moved away.[3]

This case is therefore distinguishable from *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), on which petitioner heavily relies (see Pet. 19-31). There the defendant had been aware of the ongoing investigation for some time and had already had ample opportunity to destroy any evidence in the car of which he was aware. The car was parked as usual in the driveway of his house, and there was no suggestion that the car had been used for any illegal purpose on the night in question. After the defendant was arrested, there were no other confederates at large, nor were the police

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[3]Petitioner errs in his assertion (Pet. 28-30) that any power to search the airplane without a warrant would have been extinguished once several officers had arrived at the airstrip and surrounded the plane. It is well established that, if the police have the right to conduct a search of an automobile when it is first seized, they are still permitted to conduct a warrantless search on the basis of probable cause after it has been secured. *Colorado* v. *Bannister*, 449 U.S. 1, 3 (1980); *Texas* v. *White*, 423 U.S. 67, 68 (1975); *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970). The same principle applies here.

searching for contraband or stolen or dangerous items. Under those circumstances, the *Coolidge* plurality concluded that there were no exigent circumstances that made it impracticable to secure a warrant. 403 U.S. at 460-462.[4]

b. In any event, this Court has made clear in recent years that the "automobile exception," which petitioner concedes (Pet. 19) is fully applicable here to an airplane, does not depend on any special exigent circumstances. See generally *United States* v. *Ross*, No. 80-2209 (June 1, 1982), slip op. 8-10. See also *United States* v. *Martin*, No. 81-5132 (4th Cir. Oct. 6, 1982), slip op. 9-11. Rather, the reasons that a search of an automobile is permitted without a warrant are inherent in its nature:(1) its mobility (see, e.g., *Chambers* v. *Maroney, supra*, 399 U.S. at 51) and (2) the owner's diminished expectation of privacy in a car that travels on public thoroughfares with its contents exposed to plain view (see *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion)).[5] While an airplane is not exposed to public

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[4]The court of appeals cases relied on by petitioner (Pet. 31-37) are similarly distinguishable. In *United States* v. *Fogelman*, 586 F.2d 337, 342-343 (5th Cir. 1978), the court found no exigent circumstances because the car had been parked for some time and the only two suspects were in custody. In *United States* v. *Kelly*, 547 F.2d 82, 84 (8th Cir. 1977), the defendant had been arrested, the car was unoccupied and parked on private property, and there was no indication of a friend or confederate still at large who might have been able to move the car. And in *United States* v. *Payne*, 429 F.2d 169, 172 (9th Cir. 1970), the defendant, who was seen with illegal drugs at a campsite, was clearly in the process of bedding down for the evening; there was no reason to think that he or any of his party was preparing to leave.

[5]The plurality opinion in *Coolidge* v. *New Hampshire, supra*, is not to the contrary. In addition to the special circumstances in *Coolidge* described above, the owner there was deemed not to have a diminished expectation of privacy in the car because it was parked in his private driveway, i.e., within the "curtilage" of the residence. 403 U.S. at 460.

view in the same way as a car when it is in transit, it is still open to public view when it is parked at a public airport or, as here, on the Huey farm. Thus, the warrantless search of the plane did not violate the Fourth Amendment.

2. Petitioner contends that the search of the Oldsmobile at the airport was a fruit of his illegal arrest because the car keys were seized pursuant to a search incident to that arrest. The district court correctly ruled, however, that the car and the evidence found therein were uncovered through information derived independently of any illegally seized evidence.[6] The court of appeals' affirmance of this ruling does not warrant review by this Court.

Petitioner states at the outset (Pet. 39-42) that the court of appeals failed to address his contention that there was no probable cause to search the car. In fact, the court of appeals specifically found that the affidavit supporting the warrant to search the car contained "sufficient information * * * [apart from the illegal seizure of the keys] to support the finding of probable cause" (Pet. App. A17). This conclusion was correct. The police knew that Olson had been seen sitting in the car near the Huey farm. Shortly thereafter, Wiley brought Olson to the aircraft and apparently lied about where he had picked up Olson. Marijuana was found in the plane, the keys to which were found at Olson's feet. Clearly, there was probable cause to believe that Olson was connected with the drugs in the plane and therefore that the car that Olson had been using that day could contain evidence of the crime.

Petitioner briefly contends (Pet. 43-44) that the court of appeals erred in its ruling that the search of the car was not a fruit of the illegal arrest because sufficient basis for the

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[6]The district court did suppress all evidence taken from the person of petitioner and of David, including the car keys and a motel room key, as well as evidence obtained from the motel room (Pet. App. A6).

search was derived from an independent source; he argues that the location of the car was unknown and that it was only the illegal seizure of the car keys that led the police to the car. The evidence does not demonstrate, however, that the discovery of the car was a fruit of the seizure of the keys. It is undisputed that the police already had a specific description of the Oldsmobile and its license number and that they were looking for the car (see Pet. App. A16). The airport where the airplane under suspicion was met was obviously a focus of that search. Indeed, an officer who was not involved in the illegal arrest testified that he had already located the car in question parked in front of the airport's entrance before being given the keys (Tr. 779; see H. Tr. 151). Thus, the court's finding of an independent source is soundly based in the record, and that fact-bound conclusion, concurred in by two courts below, does not merit further review. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[7]

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[7]Petitioner also seeks review of the court's holding that the inevitable discovery doctrine requires admission of the evidence seized from the car (see Pet. 44-56). As noted above, the police were already looking for the car in question, of which they had a full description, and the court of appeals' conclusion that the automobile would have been discovered, apart from the illegal seizure, is correct. Petitioner correctly notes (Pet. 52-56) that the circuits are not in accord on the application of the inevitable discovery doctrine, although the Court has nonetheless declined to review that issue in the past. See, e.g., *Fitzpatrick* v. *New York*, 414 U.S. 1050 (1974). In any event, there is no occasion to review it here. The court below invoked the inevitable discovery doctrine only as an alternative holding; the primary basis for its decision was its holding, discussed above, that the discovery of the car was not a fruit of the illegal arrest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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